

*Cao v. Mukasey*, No. 04-74073

MAR 11 2008

N.R. SMITH, Circuit Judge, concurring in part and dissenting in part.

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

I agree with the majority that the BIA correctly concluded that the IJ did not violate Petitioners' due process rights by taking on a prosecutorial role. However, I find that substantial evidence does support the BIA's finding that the Petitioners failed to demonstrate past persecution and therefore respectfully dissent as to that issue.

After the BIA reversed the IJ's adverse credibility finding and accepted all of Cao's testimony as true, the BIA nevertheless found that Cao had failed to demonstrate past persecution. "Our review of the BIA's determination that an applicant has not established eligibility for asylum is highly deferential." *Gu v. Gonzales*, 454 F.3d 1014, 1018 (9th Cir. 2006) (citing *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992)). When reviewing for substantial evidence, we must uphold the BIA's determination unless the evidence in the record *compels* a contrary conclusion. *Arteaga v. Mukasey*, 511 F.3d 940, 944 (9th Cir. 2007) (emphasis added). We may not reverse the BIA "simply because we disagree with its evaluation of the facts . . . ." *Aruta v. INS*, 80 F.3d 1389, 1393 (9th Cir. 1996) (citation omitted).

Although the majority correctly recites the substantial evidence standard, it fails to abide by it. Instead, the majority draws on sympathies for Cao to substitute

its judgment for that of the BIA, relying only on cases in which the alien was: 1) detained by authorities for relatively long periods of time; and 2) detained and beaten by authorities multiple times. *See Guo v. Ashcroft*, 361 F.3d 1194, 1197-99 (9th Cir. 2004); *Mihalev v. Ashcroft*, 388 F.3d 722, 724-26 (9th Cir. 2004); *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1132-33 (9th Cir. 2004). In so doing, the majority ignores that, in nearly identical factual circumstances to those presented here, we held that the evidence did not compel a conclusion that the alien had demonstrated past persecution. *Gu*, 454 F.3d at 1020-21.

When reviewing a case such as this one for substantial evidence, we may not agree with, for example, the Chinese authorities' treatment of Cao, and we may well believe, in contrast to the BIA, that Cao presented evidence supporting her claim of past persecution. However, our task is not to scour the record to find support for Cao's position merely because we disagree with the BIA. Our task is to scour the record to determine whether substantial evidence supports *the BIA's* determination. Under the substantial evidence standard of review, we cannot substitute our judgment for that of the BIA every time we disagree with BIA's view of the facts. *Aruta*, 80 F.3d at 1393. If we do so, the substantial evidence standard of review will be rendered worthless and we will instead be reviewing the BIA's determination de novo. We are also not free to eschew factually on point cases simply because we do not like their result. *See, e.g., Gu*, 454 F.3d at 1020-

21; *Prasad v. INS*, 47 F.3d 336 (9th Cir. 1995). In my view, the majority has done so here.